Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change

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Most of the work of public interest law organizations does not make money. How do these organizations survive, given the economic realities of law practice? Drawing on survey data from a national random sample of public interest law firms, we investigate how funding models vary across public interest organizations and how funding sources affect these organizations’ activities. We find funding structures have, over time, shifted away from foundation support toward government grants. Compared to other organizations, however, conservative organizations draw significantly less of their budget from federal and state grants, and significantly more of their budget from private contributions. Conservative organizations are significantly less likely than other organizations to rely on funding that prohibits engaging in class actions, receiving attorney’s fees, or lobbying. Respondents reported that funding restrictions hamper their ability to negotiate favorable settlements, bring about systemic change, and represent vulnerable client communities. We close with a comparative institutional analysis of different funding models.

INTRODUCTION

More than three decades ago, Justice Thurgood Marshall argued that public interest law organizations made the legal process work better, broadened the flow of information to decision makers, and opened the doors of the legal system to help ensure equal justice for all (Ford Foundation 1976). Despite these important contributions, Justice Marshall worried that public interest law faced an uncertain future. In his view, the major problem was funding (Ford Foundation 1976).

Public interest law organizations (PILOs) are unusual in that most of their work does not make money. They often represent clients who cannot afford private counsel. They take on expensive systemic reform cases with potentially far-reaching effects, but
little chance for financial gain. They engage in non-revenue-generating activities that private lawyers seldom do, including community outreach and education, talking with the media, organizing coalitions, participating in demonstrations, providing advice and assistance to help individuals resolve their legal disputes, and training law students. Although these activities are essential to the law reform and social change goals of these organizations, they do not resemble the business-like model of modern private law offices (Nelson 1988; Seron 1996; Nelson and Nielsen 2000).

There is reason to believe that the funding structures of PILOs affect not only their viability but also their strategies, independence, and susceptibility to political intimidation. For example, political interests that opposed public interest representation successfully championed legislative limits on the legal strategies of federally funded organizations, and these limitations substantially curtailed representation for individuals who rely on public legal assistance (Quigley 1998; Johnson 1999; Houseman and Perle 2007). Similarly, PILOs supported by the private bar faced repercussions when they challenged the private bar’s clients in court (Kessler 1990). Thus, funding models affect the independence and strategies of PILOs, as well as their sustainability.

How did the field of public interest law come to be, and how does it survive, given the economic realities of law practice? How do PILOs sustain themselves? How do their sources of funding affect their structures, activities, and goals? What are the implications of PILO funding strategies for access to justice and social change? We draw on quantitative and qualitative data from a representative survey of American PILOs to examine patterns in the way those organizations are funded, and shifts in those patterns over time. We also discuss how funding strategies may affect access to justice and social change.

PUBLIC INTEREST LAW ORGANIZATIONS: A BRIEF HISTORY

Three broad eras define the development of public interest law and legal aid in the United States: the Emergent Era prior to 1965, the Expansion Era from 1965 to 1980, and the Embattled Era from 1981 through the present. During the Emergent Era, efforts to provide public interest representation in the United States were relatively unstructured, scattered, and individualized. During the Expansion Era, legal aid programs grew dramatically and became institutionalized in both governmental and private organizations. The population of PILOs that focused on impact litigation as a strategy for change also expanded rapidly during this era. During the Embattled Era, PILOs came under attack and many struggled to represent their clients effectively. Each of these eras shaped the structure and practice of public interest law today.

The Emergent Era: Before 1965

Legal aid prior to the 1960s relied heavily on private attorneys to take on pro bono clients as part of their professional ethical responsibilities (Handler, Ginsberg, and Snow 1978). In the late nineteenth and early twentieth centuries, however, local
communities, sometimes with the assistance of the local bar, began to open small legal aid offices to represent indigent clients, who were often recent immigrants (Johnson 1999). The Legal Aid Society of New York, the first legal aid organization of its kind, was established in 1876 (Houseman 2001, 2002). In 1920, the American Bar Association (ABA) joined the movement to provide representation to the poor, responding to demands that the legal profession make justice accessible to all (Houseman 2002). Although legal aid programs sponsored by state and local bars proliferated in the wake of the ABA’s endorsement, these programs generally provided direct services to individual indigent clients and did little policy advocacy or community education (Houseman 2002).

Another, more activist model of public interest law also emerged during this period. This model focused on impact litigation, the strategy of bringing a lawsuit specifically to establish an important legal right or principle. One example of a PILO that employed this model to strengthen civil rights and bring about social change is the American Civil Liberties Union. The ACLU was established in 1920 to defend and preserve constitutional rights such as due process, equal protection, and free speech. Perhaps the best known of these impact litigation organizations, the NAACP Inc. Fund, was established in 1940 and orchestrated the litigation campaign that culminated in Brown v. Board of Education.1 These two organizations embodied a new strategy of social change and inspired others to found similar organizations in the public interest law expansion that began in the 1960s (Ford Foundation 1976; Davis 1995).

The Expansion Era: 1965–1980

During the Expansion Era, several factors contributed to the rapid development of the public interest law field. In the early 1960s, the Ford Foundation, along with others, funded demonstration projects for providing civil legal aid through neighborhood law offices (Johnson 1974; Davis 1995). These offices, which became prototypes for an expanded federal program, provided legal services through committed staff attorneys rather than through uneven pro bono efforts (Johnson 1999). Some were explicitly organized around an impact test case strategy, whereas others sought to provide coordinated social and legal services or a voice in welfare administration for poor communities (Johnson 1974; Davis 1995). Apart from these demonstration projects, however, previous funding for legal aid organizations came primarily from local bar and business interests. This dependence constrained the policy reform efforts of legal aid organizations, particularly in matters involving tenant claims or consumer rights (Carlin, Howard, and Messinger 1966; Abel 1985; Kessler 1990; Johnson 1999).

In 1965, the structure of legal aid changed dramatically with President Johnson’s declaration of the War on Poverty and the establishment of the Office of Economic Opportunity (OEO) Legal Services Program. The OEO program built on the demonstration project model and infused millions of federal dollars into legal services for the poor by providing grants to full-service legal aid providers distributed geographically

across the United States (Houseman 2002). At least in its early years, the OEO explicitly went beyond providing basic legal services to seek systemic law reform on behalf of the poor (Johnson 1974, 1999; Quigley 1998). This reform strategy included complex litigation on novel legal theories, class actions, legislative advocacy, and extensive appellate litigation, including seventy cases before the Supreme Court between 1967 and 1973 (Davis 1995; Johnson 1999). During this period, legal services attorneys won landmark Supreme Court decisions such as Shapiro v. Thompson, which ensured welfare recipients were not arbitrarily denied benefits, Fuentes v. Shevin, which required private parties to provide due process before repossessing property, and Goldberg v. Kelly, which held that due process required an evidentiary hearing before welfare recipients could be denied benefits (Davis 1995; Houseman 2002).

Dramatic expansion and high-profile success brought controversy, however. Government-funded legal services organizations came under attack for their law reform activities (Houseman 2002). Established business interests and powerful political actors who lost cases against legal services organizations were not happy with their success, and the first wave of attacks reflects their displeasure (Johnson 1999). The Nixon administration largely dismantled the OEO as a result (Quigley 1998; Johnson 1999; Houseman and Perle 2007). Protected by powerful allies in the organized bar, legal aid survived under the Legal Services Corporation, an independent, federally funded entity established in 1974 that provides grants to local legal services offices (Johnson 1999; Houseman and Perle 2007).

The Legal Services Corporation dramatically expanded the federal legal services program. By 1981, LSC funded 1,450 offices throughout the fifty states and most American territories, so that poor people in virtually every county had access to a legal services program (Houseman 2002). Continued federal support came at a price, however. LSC funding came with restrictions on the activities of legal services attorneys, and these restrictions increased during the Embattled Era (Quigley 1998; Johnson 1999; Houseman and Perle 2007). Nevertheless, during the Expansion Era, organizations providing legal aid proliferated across the country, largely through the support and direction of the LSC.

During roughly the same historical period, a second, cause-oriented model of public interest law with an impact litigation approach began to proliferate (Ford Foundation 1976; Handler, Ginsberg, and Snow, 1978). Rather than depending on governmental support, organizations that followed this model typically relied heavily on foundation grants and membership dues to fund their activities (Ford Foundation 1976; Handler 1978; Handler, Ginsberg, and Snow 1978). Voluntary public-sector organizations similar to the ACLU and the NAACP began to flourish in the wake of the Ford Foundation’s decision in 1970 to become a principal supporter of PILOs (Harrison and Jaffe 1973; Ford Foundation 1976; Handler, Ginsberg, and Snow 1978; Davis 1995; Houseman and Perle 2007). These alternative forms of support enabled

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5. Nixon approved the establishment of the LSC despite heavy political pressure from some quarters to eliminate federally directed legal aid programs, perhaps because of support for the LSC from powerful figures in the organized bar (Houseman 2002).
more freedom in case selection, and many of these organizations regularly brought cases against government entities and businesses.

Other developments during the Expansion Era also fueled the expansion of public interest law. Beginning in the 1960s and 1970s, federal courts relied on their equitable powers to grant successful plaintiffs their attorney’s fees in actions that vindicated the public interest (Albiston and Nielsen 2007). Fee shifting in public interest cases was eventually institutionalized in statutory provisions after 1975 and became an important source of funding for PILOs (Albiston and Nielsen 2007). During the same period, Congress enacted new civil rights statutes with private rights of enforcement, such as the Civil Rights Act of 1964. A host of new public interest organizations emerged to enforce those rights. Similarly, new environmental protection legislation and the Supreme Court’s landmark standing ruling in Sierra Club v. Morton,6 which allowed private parties to enforce environmental laws, gave rise to new PILOs. Thus, during the Expansion Era, new resources and new rights encouraged the institutionalization and diffusion of the public interest law model beyond poverty practice and legal aid.

The Embattled Era: 1981–Present

By the early 1980s, PILOs and the rights they sought to enforce were well established in American society, even though the political landscape was becoming more conservative. After the public interest expansion in the mid- to late-1970s, opposition to these organizations began to grow, especially from businesses that were targets of public interest suits regarding consumer rights or environmental violations (Aron 1989). Rather than attempt to repeal these legal victories, critics sought to undermine the financial resources on which PILOs relied. The early 1980s brought a concerted attempt to reduce or eliminate funding for progressive public interest organizations (Houseman and Perle 2007). The Reagan administration’s attempts to limit social spending and reduce the domestic role of the federal government included open hostility toward public interest organizations that had spearheaded the social initiatives of the 1960s and 1970s (Aron 1989; Kilwein 1999; Quigley 1998; Johnson 1999; Houseman and Perle 2007). Reagan had been a critic of legal aid programs ever since his unsuccessful attempt to defund California Rural Legal Assistance while governor of California (Houseman 2002). The Reagan administration did not convince Congress to weaken environmental, consumer, and civil rights statutes, or to abolish the Legal Services Corporation outright (Aron 1989; Johnson 1999). Nevertheless, Reagan joined the movement to “defund the left” by significantly reducing appropriations for the LSC and by introducing new accounting rules that prohibited political advocacy by charitable organizations that were supported even in part by public funds (Viguerie 1982; Aron 1989; Quigley 1998; Johnson 1999). He also staffed the LSC board and other LSC positions with individuals hostile to the LSC (Quigley 1998; Johnson 1999).

In the 1990s, further attacks on the funding of PILOs came from multiple fronts. In a series of civil rights fees cases, the increasingly conservative Supreme Court interpreted

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fee-shifting statutes narrowly, significantly reducing plaintiffs’ ability to recover attorney’s fees in enforcement actions (Luban 2003; Albiston and Nielsen 2007). Although the LSC weathered the 1980s to enjoy a brief increase in LSC appropriations during the early 1990s, the political shift toward the right in Congress in the mid-1990s produced dramatic challenges for LSC-funded organizations. In 1996, Congress reduced LSC funding from $400 to $278 million, a 30 percent cut in federal funding in just one year (Quigley 1998). As a result, LSC programs closed more than 100 offices and laid off 14 percent of their legal services lawyers (Quigley 1998). During the 1990s, even law school clinical programs came under attack; environmental law clinics at a number of law schools lost their funding, their standing, and even their institutional homes at the behest of local business interests whom they had challenged in court (Luban 2003).

In the 1990s, private interests joined the fray by challenging the constitutionality of state Interest on Lawyer’s Trust Account (IOLTA) programs (Luban 2003). IOLTA programs, which now exist in all fifty states, generate funds from interest on lawyers’ trust accounts to support legal aid, legal education for the public, and other programs designed to improve the quality of justice. Somewhat ironically, the Washington Legal Foundation, a conservative public interest organization, brought a series of challenges by private parties arguing that these programs constituted an unconstitutional taking of the interest on clients’ funds without just compensation. These challenges enjoyed initial success in Phillips v. Washington Legal Foundation, in which the Supreme Court held that “interest income generated by funds in IOLTA accounts is the ‘private property’ of the owner of the principal,” and thus property potentially subject to a taking. The Court left open whether income on these accounts had been taken by state IOLTA programs, as well as the just compensation, if any, that would be due if that were so.

Phillips raised the specter of complete shutdown of a tremendously significant source of funds for PILOs. For example, in 2001, the aggregate value of funds generated by IOLTA programs exceeded $200 million. In comparison, the entire budget for the Legal Services Corporation for the same year was slightly over $300 million (Houseman and Perle 2007). It seemed clear that if interest generated by client funds in IOLTA accounts were the private property of the client, and the state appropriated those funds to support public interest programs, a taking likely occurred. What kept IOLTA programs provisionally operating for five years was one crucial unanswered question: In such circumstances, what compensation was due to the client, whose funds would not have generated recoverable interest but for the institutional structure of the IOLTA program?

In 2003, the Court answered this question in Brown v. Legal Foundation of Washington, in which it held that no compensation was due for the taking of interest accomplished by the state’s IOLTA program. The Court noted that “the ‘just compensation’ required by the Fifth Amendment is measured by the property owner’s loss rather than the government’s gain.” Under the terms of Washington State’s IOLTA program, attorneys

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9. Id. at 172.
12. Id. at 235–36.
were prohibited from depositing any client funds that could earn interest (net of the administrative costs of reimbursing their clients) in an IOLTA account. Accordingly, by definition, the loss to clients from state appropriation of interest on IOLTA funds would be zero, so that no compensation would be due. After Brown, many public interest organizations heaved a collective sigh of relief. Nevertheless, the IOLTA challenges brought into focus the political vulnerability created when public interest organizations relied on government funds for support.

Despite these setbacks, at least one segment of PILOs flourished during the Embattled Era. Conservative public interest organizations enjoyed significant success in the courts, particularly on issues of religious freedom and affirmative action (O’Conner and Epstein 1984; Heinz, Paik, and Southworth 2001; Southworth 2005; Hacker 2005; Teles 2008). Conservative PILOs won important Supreme Court decisions in Rosenberger v. Rector and Visitors of the University of Virginia,13 a religious liberties case, Reno v. Bossier Parish School District,14 which restricted the use of race in local redistricting, and United States v. Morrison,15 which held that portions of the Violence Against Women Act exceeded Congress’s power under the commerce clause (Teles 2008). Conservative PILOs also won a partial victory in Gratz v. Bollinger and Grutter v. Bollinger,16 which limited the use of preferences in undergraduate admissions (Teles 2008). To be sure, conservative public interest organizations also came under attack, accused by critics of the misuse of their nonprofit status in violation of their charitable purposes and goals (Houck 1984). Conservative success in the public interest field, however, may also be seen as evidence of how institutionalized, legitimate, and accepted cause-oriented lawyering had become by the Embattled Era.

Indeed, there is a deep irony here. The most outspoken critics of the Embattled Era were conservatives, who argued for abolishing the Legal Services Corporation because, in their view, it engaged in social change advocacy at the expense of providing direct legal services to the poor (Boehm and Flaherty 1995). Conservative critics also claimed that cause-oriented litigation was fundamentally undemocratic because it circumvented legislative policy making (Institute for Educational Affairs 1981). In their view, it replaced enforcement by a democratically accountable state with private enforcement free from the discipline of the electoral process (Institute for Educational Affairs 1981; Decker 2009). At bottom, conservative critics questioned whether PILOs could legitimately represent the public interest in court (Decker 2009). Nevertheless, even as these critiques were aired, conservative PILOs pursued and won many landmark Supreme Court decisions that changed policy to support their causes (Teles 2008).

Progressive critics also expressed deep ambivalence about PILOs during the Embattled Era. They argued that social change litigation drains energy and resources from more promising political strategies, produces only ephemeral victories, may provoke backlash, and, by working with the system, reinforces the legitimacy of larger structures of inequality (Freeman 1982, 1998; Tushnet 1984; Rosenberg 1991; Klarman 1994; see Albiston 2011). Critiques from the left tended to focus on the futility of

litigating for social change, rather than its illegitimacy, however. In contrast, conservatives challenged progressive public interest law on two seemingly contradictory fronts: questioning the legitimacy of litigating for social change while simultaneously advancing conservative policy goals through the courts.

As this brief history attests, battles over funding, often tied to politics and vested interests, thread through the development of the public interest field. In the Emergent Era, providing legal aid became an important source of legitimacy for the organized bar's status as a profession, deflecting criticism that lawyers were merely the legal agents of powerful interests. Faced with extreme wealth and power imbalances between established interests and the immigrant poor, and subject to sharp critiques during the Progressive Era, the bar established a professional obligation to provide pro bono representation to restore legitimacy to itself and the legal system. The form and structure of those efforts, however, generally conformed to the individual representation model that defined the profession, even in bar-supported legal aid offices.

By the Expansion Era, a new, more political role began to emerge for public interest law. The litigation campaigns of the civil rights movement revealed how the pluralist political system failed to represent African American interests. Public interest representation came to be seen as a means to give underrepresented constituencies a voice in the political process (Zemans 1983) and to vindicate important public values through private enforcement (Albiston and Nielsen 2007). In *NAACP v. Button*, the Supreme Court explicitly referenced the emerging political role of public interest litigation in the face of a nonresponsive political system.

In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . [U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.17

This decision, and others that followed, blurred the distinction between adjudication and politics, and changed the meaning of public interest litigation from pro bono representation to explicit political activism. Moreover, this activism, the Court held, was desirable as a form of “orderly group activity” (in contrast to the violent protests that filled the news) that “made possible the distinctive contribution of a minority group to the ideas and beliefs of our society.”18

This shift toward a more political view of public interest law had at least two effects on the formation and funding of PILOs. It encouraged activists on both the left and the right to found public interest organizations focused on litigating for a cause. It also attracted financial support from foundations and individuals outside the organized bar who wished to pursue social change. Poverty practice remained a significant part of

18. Id. at 336–37.
public interest practice, and PILOs representing poor clients won many important legal victories, changing policies that affected their clients. But public interest law was no longer understood as merely the bar’s attempt to legitimate the legal system by ensuring that the poor had adequate legal representation. Now it had become political expression, a legitimate and powerful means for political interests and social movements to further their goals.

The Influence of Resources

Theories explaining the development of the field of public interest law vary. Some comparative studies seem to assume that the public interest field simply evolved naturally, its changing nature the product of maturation over time within expanding welfare state societies (Cappelletti, Gordley, and Johnson 1975). A less descriptive view is that the expansion of public interest law, particularly of legal aid for the poor, served the interests of both the legal profession and societies based on capitalist economies. States, it was argued, could mollify the working class and poor by granting a range of welfare rights; at the same time, the legal profession could avoid undertaking the massive pro bono efforts that might otherwise be necessary to legitimate and sustain the legal system (Abel 1985). Other explanations focus on how political forces have shaped the field of public interest law, allowing expansion during progressive times and forcing contraction and retrenchment with conservative shifts in the political climate (Kilwein 1999; Johnson 1999).

Neoinstitutionalist organizational theories offer another possible interpretation: multiple PILO prototypes consolidated into one or two organizational forms as advocates followed the lead of successful organizations like the NAACP Legal Defense Fund or the ACLU (Handler 1978; Aron 1989; DiMaggio and Powell 1991). As PILOs became taken-for-granted strategies for pursuing social change, perhaps new organizations mimicked the form of successful older organizations. Through this mimetic isomorphism, a uniform organizational design may have diffused across practice areas and political orientations (DiMaggio and Powell 1991). Similar legal and political environments also may have produced commonalities among PILOs. To the extent that PILOs respond to common requirements imposed by funders as well as government rules for nonprofits, coercive isomorphism may contribute to structural uniformity among PILOs despite their diverse missions (DiMaggio and Powell 1991). Indeed, research suggests that PILOs with similar forms now span political orientation and practice area boundaries (O’Connor and Epstein 1984; Southworth 2005).

These theories suggest an answer to the puzzling question of why lawyers, foundations, and the public would support public interest law financially. They help explain why welfare states might fund legal representation as a poverty benefit, why legal professionals might donate their time and money to organizations that could be viewed as competitors, and how organizations might come to adopt similar funding structures across strikingly diverse subject areas and ideological lines. What they do not tell us, however, is how funding strategies might generate variation among PILOs, shape PILOs’ strategies for social change, and affect their independence from political interference and attack.
We sought to build on these theories to illuminate how the resources that sustain public interest organizations reflect historically contingent political and social constituencies that may both facilitate and hinder PILOs’ ability to pursue their goals. One must be cautious in attributing causal weight to historical events, but the brief history outlined above suggests that relying on federal funds left poverty organizations vulnerable to political attack and to legislative efforts to curtail their advocacy. In fact, LSC-funded poverty organizations pursued explicitly activist test case strategies in their early years, but were forced to abandon these strategies in the wake of political attacks on their funding. In contrast, civil rights, consumer, and environmental organizations that were established through foundation grants and membership dues were better able to withstand political pressures to limit their litigation strategies. Like any nonprofit organization dependent on its funders, however, these organizations still had constituencies to please to ensure ongoing financial support (Alexander 1998). In short, resource mobilization on various fronts has been a driving force behind the development and embattlement of this field. Accordingly, understanding variation in PILOs’ funding patterns may shed some light on the institutionalization of public interest firms, as well as their relationships with the government, the organized bar, and the public. It may also tell us something about these organizations’ vulnerability to influence and control.

We draw on qualitative and quantitative data from our survey to explore several questions: How do current PILOs fund their activities? On what sources of support do they rely? Are funding models uniform, suggesting institutionalization, or do they vary across political orientation or practice area? How have they varied over time? What are the implications of different funding models for these organizations’ activities? We then discuss what our findings might mean for the structure and strategies of PILOs. We also consider the comparative institutional implications of different funding models for the field as a whole and for access to justice and social change.

METHOD AND DATA

Definition of Public Interest Law Organization

In this study, we are primarily interested in exploring variation in strategy, structure, and mission among private organizations that used law, at least in part, as a strategy to pursue their goals. Accordingly, for purposes of this study, we define public interest law organization as follows:

An organization in the voluntary sector whose activities (1) seek to produce significant benefits for those who are external to the organization’s participants, and (2) involve at least one adjudicatory strategy.19

19. This definition is a modified version of the one adopted by Handler, Ginsberg, and Snow (1978) in their early study of public interest law firms. Our definition is broader than just traditional public interest firms, and might better be labeled “public interest law organizations” or “public interest litigating entities.” For example, law school clinics are public interest law organizations to the extent that they otherwise meet our criteria.
This definition excludes individual pro bono work in private firm settings, organizations such as trade organizations formed to pursue benefits for their members, private for-profit businesses, and government organizations. In addition, we adopted two other limitations. First, we focus on organizations in the United States, leaving aside for the moment the question of cross-national differences in PILOs. Second, we exclude organizations that focus primarily on criminal law and clients.20

We limited our study to organizations that employed a lawyer at least part time because we are specifically interested in lawyers as agents for social change, their different and perhaps changing roles in public interest organizations, and in how they resolve professional dilemmas unique to this practice setting. Similarly, we required organizations to employ at least one adjudicatory strategy because in our future analysis of these data we seek to understand how these lawyers integrate traditional adjudicatory strategies with other strategies for social change, and how they resolve potential conflicts between the two.

As this definition makes clear, ours is not a study of public interest practice or “cause lawyering” in general because such a study might also include, among other things, pro bono work by attorneys in private practice and other nontraditional forms of law practice perhaps not captured by our definition. Indeed, defining public interest law, or “cause lawyering” in general, is not an easy task (Menkel-Meadow 1998). Although in the future we hope to compare our findings to research about cause lawyers in other organizational settings, our goal for this project is to examine variation within public interest organizations themselves. We chose this approach because too often these organizations are treated as essentially all the same, lumped together in the category of “public interest law.” Instead, we sought to explore the diversity of organizations in this field. Accordingly, we examine people who come together to form an organization dedicated to pursuing benefits that accrue to people other than themselves and who utilize adjudicatory strategies to do so, but we do not assume these organizations are all the same. As we will show, variation among these organizations roughly tracks the development of the field described in the historical section above.

Sampling Frame and Strategy

To produce a random sample of public interest organizations that fit this definition, we first developed a sampling frame of organizations that potentially met our criteria. We compiled an exhaustive list of public interest organizations engaged in legal activity

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20. Criminal law organizations tend to differ qualitatively from voluntary organizations engaged in civil practice in many ways, including the stakes at risk, the incentives for compromise or going forward, and the process through which the organizations find and select their clients. For example, representation in criminal cases often is constitutionally required and funded by the government. Criminal defense attorneys may have little choice concerning which clients they represent. Even those criminal-law-oriented organizations that do not rely on government funding are likely to litigate almost exclusively against government entities. Accordingly, many of the issues we sought to explore, including how external funding environments influenced organizational strategies and structure, and how organizations conceptualize and pursue their objectives, are not as relevant to criminal law organizations. For these reasons, we chose to focus our study on private voluntary civil justice organizations, which have more flexibility and control over strategies and cases they choose.
from several sources, including: (1) records of amicus briefs filed by public interest organizations before the Supreme Court; (2) scholarly books and articles that list public interest legal organizations; (3) directories of public interest organizations; (4) lists of providers of free legal services obtained from state bar associations and Internet Web sites; (5) lists of organizations receiving funding from Interest on Lawyer Trust Accounts (IOLTA) obtained from state IOLTA programs; and (6) Internet searches to identify potential public interest organizations. Our strategy was to err on the side of inclusion and leave the final determination of whether an organization met our criteria until a later stage of the sampling process.

By using multiple strategies, we attempted to capture as diverse a group of public interest organizations as possible. For example, our amicus brief strategy was likely to capture organizations seeking to influence policy by participating in high-profile litigation. In contrast, the information from IOLTA programs and free legal service providers ensured that smaller organizations that provide direct legal services were also represented. We searched lists and national directories that spanned the political spectrum and that captured a diversity of organizations. By the end of our search, new sources were typically redundant with the organizations that we had already identified. Although no search strategy can ensure perfect representation, we believe that our comprehensive list fairly represents the diversity of public interest organizations.

Through this approach, we constructed a sampling frame of 4,588 organizations, not all of which, of course, ultimately fit our definition. We then drew a random sample of 1,200 organizations from the sampling frame, and focused our efforts on narrowing the sample to only those organizations that met our criteria. We accomplished this narrowing process through information from publicly available sources such as Web sites or literature put out by the organization. In some instances, we contacted the organization directly by telephone to clarify its status, or, where only a mailing address was available, by sending a short questionnaire that asked about adjudicatory strategies and employment of lawyers. This yielded a sample of 327 organizations. We then contacted each organization to identify an appropriate individual within that organization to answer basic questions about the organization’s structure and activities.

### Survey of Sample Organizations

We surveyed these organizations to investigate variation in their strategy, structure, and mission utilizing a telephone survey consisting of primarily closed-ended questions and a few open-ended questions that could be answered with a short response. The survey addressed the organization’s history and mission, budget and structure, goals and activities, and strategies for pursuing those goals. The survey also contained screening questions to ensure that the organization met our criteria for inclusion in the study.

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21. To ensure that our sample contained enough valid public interest organizations for the study, we needed to know approximately the proportion of organizations on the comprehensive list that fit our definition. We estimated this proportion by drawing a preliminary random sample of 100 organizations from the list. This sample yielded twenty-two organizations that fit our definition. We sought a final sample of between 250 and 300 public interest organizations; accordingly, we drew a random sample of 1,200 organizations from the comprehensive list.
A pretest of the survey was conducted with twenty-five organizations from a random sample separate from the main sample, and minor modifications of the survey instrument were made after the pretest. None of these twenty-five cases was included in the production sample.

We contracted with the University of Wisconsin Survey Center to contact each organization and to field the telephone survey. Respondents were mailed an advance letter regarding the nature of the study, and returned letters were traced to find accurate information for each organization. Organization representatives were then contacted by phone to complete the survey, which produced data from closed-ended questions and digital recordings of responses to some short answer questions. Fifty-seven organizations were excluded from the study based on the initial screening questions because they did not meet our criteria. Of the remaining 270 organizations that fit our criteria, 221 completed the survey, yielding a response rate of 82 percent, which is quite good for an organizational survey such as this.22

HOW PUBLIC INTEREST ORGANIZATIONS FUND THEIR ACTIVITIES

Sources for Funding the Cause

We know from prior studies that public interest organizations rely on a variety of funding sources to support their activities (Handler 1978; Handler, Ginsberg, and Snow 1978; Houck 1984; Aron 1989). These include grants from federal and state governments, private foundation grants, membership dues, contributions or gifts from private individuals, and attorney’s fees. In addition, some organizations obtain outside fellowships for starting attorneys, such as those funded by the Skadden Foundation, the Open Society Foundation, or Equal Justice Works. Public interest organizations also rely on nonmonetary resources to leverage their efforts. These resources include cocounseling cases with other attorneys, using outside attorneys to perform some of their legal work, accepting in-kind contributions (such as office space, equipment, or services), relying on student interns to help with their work, and establishing 501(c)(3) tax-exempt status.

Figure 1 shows the percentage of PILOs in our sample that make use of various resources to support their activities. Several resource strategies were nearly universal, suggesting an institutionalized model for PILOs. For example, although nonprofit status was not a requirement for inclusion in our study, virtually all these organizations have 501(c)(3) tax-exempt status. Almost all organizations either cocounseled cases or used outside attorneys to do some of their legal work, and 88 percent operated student intern programs, which involved, on average, ten students per year. A smaller proportion of organizations, about 65 percent, received in-kind contributions to support their activities.

22. See Sutton et al. (1994, 944, 952–53) (reporting that response rates in organizational studies range from 36 percent to 54 percent). In an attempt to improve the response rate after exhaustive attempts to reach some organizations, the survey was converted from a CATI instrument to a paper-and-pencil form and mailed to all nonrespondents and refusals. Two organizations completed the mail survey rather than the telephone format.
Other resource strategies were less common. We were surprised to learn that only about a quarter of our organizations relied on membership dues to support their activities. We anticipated that a much larger percentage of these organizations would have adopted the membership model of the ACLU and NAACP LDF to fund their activities, given the visibility and leadership of these organizations in the field. Because our sample contained some larger outlier organizations in terms of their membership, the median membership offered a better estimate of their typical size than the mean: the median membership organization had 2,000 members, and the average cost of a typical membership was $57, which gives a sense of the resources brought in through membership dues. Other resources were also far from universal. Fewer than half the organizations in our sample ever had an attorney supported by an outside fellowship, although a small proportion (6 percent) operated internally funded fellowship programs of their own.

Figure 2 provides more detailed information about the relative proportions of organizational budgets from different sources. On average, federal funds and private foundations account for the largest percentage of support for these organizations (see also Nielsen and Albiston 2006). Private contributions and state funds are the next largest categories of support, while membership dues, attorney’s fees, and fundraising events each account for only about 5 percent of budgets, on average. It is striking how much PILO funding comes from sources that are largely beyond the organizations’ control, like state or federal grants, compared to membership dues or fundraising events, although private contributions offset this somewhat. As we discuss in more detail below, this government-heavy funding structure may put some organizations at risk of outside control over their agenda and their activities.

Although it is difficult to make comparisons over time without longitudinal data (i.e., data on the same organizations across time periods), we can surmise how funding structures may have changed by comparing our data to two earlier studies of public interest organizations (see Figure 3). Handler, Ginsberg, and Snow (1978) conducted a survey of public interest organizations in 1975, which found that, on average, organizations received 8 percent of their budget from federal funds, and 1 percent from state funds. A much larger percentage of organizational budgets in the Handler study came
from foundation grants (42 percent), membership dues (19 percent), and contributions or gifts (25 percent) than in our sample. A survey conducted by Aron (1989) approximately ten years later found that public interest organizations, on average, received 18 percent of funding from federal funds and 3 percent from state and local funds. Other sources, while still important, were shrinking in terms of their relative proportion of the average budget: that is, a smaller percentage of organizations’ budgets came from
foundation grants (24 percent) and membership dues (11 percent), although contribu-
tions and gifts from all sources remained essentially stable (24 percent).

Alongside our survey results, these data, although not perfectly comparable over
time, suggest a shift in funding structure over time, away from foundation support and
toward greater dependence on government grants. This pattern is consistent with
historical accounts of this period, including the gradual withdrawal of foundation
support after the initial surge of organizational foundings in the early 1970s (Johnson
1999; Houseman and Perle 2007). Most generous foundation grants to PILOs were
intended to bring new organizations into existence rather than to provide ongoing
operational support, and therefore were for limited periods of time. Although the Ford
Foundation continued its support for PILOs into the 1970s, by the late 1970s internal
budget reductions and a new director resulted in reduced funding to PILOs
(Herschkoff and Hollander 2000). Many organizations faced serious challenges locating
funds to continue their activities after the Ford Foundation reduced its support
(McCann 1986). PILOs’ increasing reliance on federal funding also likely reflects the
continuing role of the Legal Services Corporation in supporting poverty-oriented legal
services. The somewhat later surge in reliance on state funds likely reflects the rise of
state IOLTA programs, the first of which were established in the early 1980s. Together,
these data show how state and federal funding have come to dominate the budgets of
public interest organizations over time.

We stress again that these are not longitudinal data; they are not data on the same
sample of organizations over time. All three of these studies are cross-sectional surveys
of different samples of organizations at one point in time. Nevertheless, our definition
of public interest law organization is modeled on that of Handler, Ginsberg, and Snow to
increase the comparability of our data, and we asked specific questions drawn from the
Handler, Ginsberg, and Snow study for the same reason. Because they are collected at
only one point in time, cross-sectional data for an individual organization may reflect
anomalous variation related to the point in time at which they were collected, such as

23. In 1969, when faced with congressional inquiries into why the Ford Foundation supported
“radical” social change organizations, McGeorge Bundy (then president of the foundation and a supporter
of public interest law firms) suggested that grants provided opportunities to redirect young, potentially
radical organizations toward responsible and constructive action (Roelofs 2003, 125). Even after the late
1970s, when Franklin Thomas became president, the Ford Foundation continued to support PILOs, but not
at the same level as during the Expansion Era (Nagai, Lerner, and Rothman 1994).

24. The causes behind the ebb and flow of funding from various sources are difficult to determine.
Many liberal foundations provided initial support to public interest law organizations during the Expansion
Era. It is not clear, however, whether these foundations withdrew some of that support because they moved
on to other causes, because some PILOs took radical stances that made elite foundations uncomfortable and
attracted regulatory attention, or because government funding through the LSC seemed permanent and
sufficient, at least for poverty organizations.

25. Because of human subjects requirements and confidentiality concerns, we cannot reveal whether
any of our organizations were also surveyed in one or both of the prior surveys.

26. Some public data exist on public interest law organizations that are 501(c)(3) organizations
through Form 990s, but these data do not contain enough detail on sources of funding or other variables to
allow comparison to prior studies like Handler, Ginsberg, and Snow. In addition, these public data are
underinclusive of the population of interest because organizations in our study without 503(c)(3) status are
not required to file Form 990. We were also concerned that, unlike our survey data, public data are not
anonymous and are widely available, and therefore may introduce reporting bias that our confidential survey
perhaps avoids.
a significant grant or gift coming in that year. Nevertheless, we are not aware of any significant systemic bias associated with 2004, the year in which we conducted our survey, as compared to, for example, 2001 in the aftermath of the September 11 attacks, or 2008 after the collapse of the stock market. Should support for additional research become available, we would like to collect longitudinal data on our organizations because, to our knowledge, no representative source of longitudinal data now exists on PILOs in the United States.

Variation in Funding Across Practice Areas

How do organizations differ by practice area on the use of these various resources? About 25 percent of our sample organizations were LSC-funded organizations, and about 44 percent engaged in poverty practice generally, while the remaining 66 percent practiced in civil rights, environmental law, consumer law, and other specialized areas. Using self-reported data regarding the organization’s primary area of practice—environmental, consumer, economic liberalism, civil liberties/civil rights, and poverty27—we conducted one-way ANOVAs to determine whether there were statistically significant differences among practice areas in the use of various resources. Certain resources seemed to be institutionalized across practice areas: there were no differences among practice areas in the likelihood that organizations had a staff fundraiser, made use of outside attorneys to do some of the organization’s legal work, or had an internal fellowship program.

In contrast, there was significant variation in the likelihood of an organization being a membership organization ($F (4, 178) = 12.285, p < .001$), receiving LSC funds ($F (4, 177) = 14.497, p < .001$), obtaining externally funded fellowships ($F (4, 173) = 4.455, p < .01$), or holding 501(c)(3) status ($F (4, 174) = 3.782, p < .01$). Environmental and economic liberalism organizations (i.e., organizations that promote deregulation and laisse-faire capitalism) were significantly more likely than others to be membership organizations.28 We found this result somewhat surprising given the high profile of some membership-oriented civil rights organizations such as the ACLU.

It is perhaps less surprising that poverty organizations were significantly more likely than others to receive LSC funds.29 This difference likely reflects the path-dependent development of these organizations (Pierson 2000) because many poverty organizations were initially established in the 1960s as part of the OEO Legal Services Program, which then transitioned to become the LSC. As we discuss in more detail below, today LSC

27. Some organizations had practice areas coded “Other,” which would include, for example, activities such as pro bono legal services for the arts. Organizations coded “Other” are excluded from the analysis that follows for clarity of presentation.

28. Environmental organizations ($M = .70, SD = .483$) were more likely than civil liberties ($M = .29, SD = .548$), poverty ($M = .07, SD = .259$), civil rights ($M = .05, SD = .179$) or consumer ($M = .38, SD = .518$) organizations to be membership organizations; environment versus civil liberties, $p < .01$; environmental versus poverty, $p < .001$; environmental versus consumer marginally significant, $p = .06$.

29. Poverty organizations ($M = .49, SD = .503$) were more likely than consumer ($M = .13, SD = .354$) or civil rights ($M = .05, SD = .216$) organizations to receive LSC funds, $p < .01$. No environmental or economic liberalism organizations received LSC funds.
funds carry restrictions on law reform efforts that significantly constrain the litigation strategies LSC organizations may use. Thus, poverty organizations' historical reliance on federal funding may have left these organizations more vulnerable to political attack and control than organizations with other funding models.

Poverty and civil rights organizations were more likely than environmental or economic liberalism organizations to have had an attorney funded through an outside fellowship program such as the Skadden Foundation or the National Association for Public Interest Law (now Equal Justice Works). Organizations focused on economic liberalism may be less likely to obtain outside fellowships because they are also less likely to have 501(c)(3) status, which is almost always a prerequisite to receiving these fellowships. Environmental organizations may be less likely to receive outside fellowships because several foundations only grant fellowships to organizations that serve the civil legal needs of the poor. This focus would disqualify most environmental organizations except perhaps those working on environmental justice issues. Environmental, civil liberties, and poverty organizations were more likely to have student intern programs than were consumer organizations.

Our more detailed data regarding percent of budget that organizations receive from various sources show much the same conclusion: funding structures seem largely institutionalized across practice area boundaries. We conducted one-way ANOVAs to determine whether there were statistically significant differences among practice areas on the various sources on which these organizations relied to support their activities. Only a few of the differences among practice areas were statistically significant, and for the most part these were not surprising. Post hoc tests revealed significant differences between environmental organizations and other organizations in the proportion of the organizational budget that came from foundation grants: $F (4, 168) = 4.888, p < .01$. Environmental organizations ($M = 48.32, SD = 21.61$) received significantly more of their budget from foundation grants than did consumer organizations ($M = 27.76, SD = 34.30$) ($p < .086$), economic liberalism organizations ($M = 19.63, SD = 25.01$) ($p < .05$), civil rights organizations ($M = 24.39, SD = 26.05$) ($p < .01$), or poverty organizations ($M = 16.61, SD = 17.99$) ($p < .001$). Post hoc tests also indicated that poverty organizations relied significantly more heavily on state and federal funds than did other organizations.

30. Poverty organizations ($M = .65, SD = .480$) were more likely than environmental organizations ($M = .111, SD = .333; p < .01$) and civil rights organizations ($M = .49, SD = .504; p < .05$) to have attorneys funded by outside fellowships. Civil rights organizations were also more likely than environmental organizations to have attorneys funded by an outside fellowship, $p < .05$. No economic liberalism organizations had ever had an attorney funded by an outside fellowship.

31. About 75 percent of economic liberalism organizations had nonprofit status, compared to 97 percent of other organizations. Although this difference was not statistically significant, this may be due to the small number of economic liberalism organizations and missing data.

32. One-way ANOVA, $F (4, 176) = 3.719, p < .01$. Civil rights ($M = .873, SD = .336; p < .05$) and poverty ($M = .94, SD = .245; p < .01$) organizations were more likely than consumer ($M = .63, SD = .518$) organizations to have student intern programs. All environmental organizations had student intern programs.

33. Federal funds made up a greater percentage of the budget of poverty organizations ($M = 31.42, SD = 28.83$) than of consumer organizations ($M = 0.91, SD = 1.77$) ($p < .01$) or civil liberties organizations ($M = 20.07, SD = 30.75$) ($p < .05$). State funds made up a greater percentage of the budget of poverty organizations ($M = 48.32, SD = 21.61$) than of consumer organizations ($M = 27.76, SD = 34.30$) ($p < .086$), economic liberalism organizations ($M = 19.63, SD = 25.01$) ($p < .05$), civil rights organizations ($M = 24.39, SD = 26.05$) ($p < .01$), or poverty organizations ($M = 16.61, SD = 17.99$) ($p < .001$). Post hoc tests also indicated that poverty organizations relied significantly more heavily on state and federal funds than did other organizations. For federal funds, $F (4, 172) = 5.509, p < .001$; for state funds, $F (4, 171) = 4.338, p < .01$. One other comparison revealed a startling significant
difference: economic liberalism organizations received significantly more of their budgets from fundraising events than did all other types of organizations, $F (4, 169) = 8.155, p < .001$. Civil rights organizations ($M = 6.82, SD = 9.94$), poverty organizations ($M = 3.67, SD = 6.83$), environmental organizations ($M = 2.52, SD = 3.40$), and consumer organizations ($M = 0.37, SD = 0.99$) all averaged less than 10 percent from fundraising events, compared to nearly three times this percentage for economic liberalism organizations ($M = 28.37, SD = 41.39$).  

**Variation by Political Orientation**

Although public interest law began as a largely liberal or progressive movement, PILOs now operate across the political spectrum (O’Connor and Epstein 1984; Aron 1989; Southworth 2005; Hacker 2005; Teles 2008). This trend raises an interesting empirical question: Do conservative organizations employ different funding models than other organizations? Based on self-reported data, about 10 percent of our sample organizations identified themselves as conservative or libertarian, about 85 percent identified themselves as liberal or progressive, and about 4 percent described themselves as “something else.” For ease of presentation, we combined conservative and libertarian organizations and compared these to all other organizations. In the analysis that follows, “conservative” includes libertarian.

Using self-reported data regarding the organization’s political orientation, we compared conservative organizations to others in our sample in terms of their use of the resources listed in Figure 1. For the most part, there were no differences between conservative and other organizations, with the exception that conservative organizations ($M = .20, SD = .410$) were significantly less likely than others ($M = .55, SD = .499$) to have had an attorney funded by an external fellowship program. This is consistent with the findings regarding these fellowships and economic liberalism organizations discussed above. This finding may also reflect foundation giving patterns on the right: conservative foundations tend to focus their support on general operating support rather than on the more episodic and limited projects that liberal public interest fellowship programs often fund (Covington 1997).

Although conservative organizations relied on the same types of resources as other organizations, their relative emphasis on various funding sources was different. Compared to other organizations, conservative organizations drew significantly less of their budget from federal and state grants, and significantly more of their budgets than of civil liberties organizations ($M = 19.85, SD = 19.79$) than of civil liberties organizations ($M = 19.85, SD = 19.79$) than of civil liberties organizations ($M = 10.20, SD = 20.53$) ($p < .01$). Neither environmental nor economic liberalism organizations relied on federal or state funds.

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34. All post-hoc comparisons were significant at the $p < .001$ level.

35. Independent sample $t$-test, $t(26) = -3.538, p < .01$. Levene’s test indicated unequal variances ($F = 67.26, p < .001$), so degrees of freedom were adjusted from 196 to 26.

36. Federal funds made up a smaller proportion of the budgets of conservative organizations ($M = 10.31, SD = 30.90$) than of the budgets of other organizations ($M = 24.58, SD = 30.03$), $t(178) = -1.953, p = .05$. State funds made up a smaller proportion of the budgets of conservative organizations ($M = 2.85, SD = 12.17$) than of the budgets of other organizations ($M = 15.05, SD = 20.71$), $t(32) = -3.774, p < .001$. For state funds, Levene’s test indicated unequal variances ($F = 11.56, p = .001$), so degrees of freedom were adjusted from 178 to 32.
from private contributions\textsuperscript{37} (see Figure 4). Accordingly, conservative organizations did indeed seem to have a different funding model than other organizations. As we discuss in more detail below, the different funding model of conservative organizations may help insulate them from outside control of their activities compared to other PILOs.

**Consequences of Funding Models for Independence and Outside Control**

What are the consequences of these different funding models for public interest organizations? One important finding from this study is the significant (and increasing) dependence of public interest organizations on federal and state funding (see also Nielsen and Albiston 2006). Two recent trends raise concerns about this funding model. First, the amount of funding from both state and federal sources has decreased significantly in recent years, in part in response to political pressures to limit funding to organizations that threaten established interests (Aron 1989; Kilwein 1999; Johnson 1999; Houseman and Perle 2007). Second, recent legislative restrictions on the activities of LSC-funded organizations have severely curtailed the kind of work they can undertake. These legislative restrictions raise important legal questions about whether conditions on government funding violate constitutional protections, and important

\footnote{Private contributions or gifts made up a smaller proportion of the budgets of conservative organizations ($M = 29.09$, $SD = 30.42$) than of the budgets of other organizations ($M = 13.93$, $SD = 18.23$), $t(20) = 2.128$, $p < .05$. Levene's test indicated unequal variances ($F = 11.41$, $p = .001$), so degrees of freedom were adjusted from 178 to 20.}
practical questions about the downside of relying on government support (Kilwein 1999; Quigley 1998; Nielsen and Albiston 2006).

Congress’s decision to impose new legislative restrictions on the law reform activities of LSC-funded organizations had far-reaching consequences. The Omnibus Consolidated Rescissions and Appropriations Act of 1996 prohibits, among other things, the use of LSC funds for programs that engaged in redistricting, lobbying, class action suits, training for political activities (such as picketing or demonstrations), any activities directed toward reforming federal or state welfare systems, and abortion or prison litigation. These new restrictions also cut off alternative sources of funds by prohibiting LSC organizations from recovering their attorney’s fees through fee-shifting provisions common in civil rights statutes. Faced with significant opposition to doing away with legal services organizations altogether, Congress devised a far more subtle strategy to leverage federal funds to control the activities of these organizations instead.

These restrictions have not gone unchallenged. The most significant challenge was Legal Services Corporation v. Velazquez, in which the Court overturned the provision prohibiting LSC attorneys from challenging welfare statutes or regulations in the course of representing their clients. Velazquez held that once Congress has chosen to subsidize lawyers for the poor, it may not impose viewpoint-specific restrictions on a lawyer’s efforts to represent a client’s interests without running afoul of the First Amendment. The Court recognized that such conditions on funding “in effect insulate [the government’s] own laws from legitimate judicial challenge.”

Although Velazquez did away with one significant restriction on legal services advocacy, to a certain extent virtually every one of the restrictions in the 1996 legislation insulates the government’s laws from challenge by limiting the representation that LSC attorneys may undertake. As the Court noted in Velazquez, for LSC clients,

40. Id.
41. Id.
42. Id. at Stat. 1321-55.
43. Id. at Stat. 1321-55–1321-56.
44. Id. at Stat. 1321-55.
45. Id.
46. See, e.g., Legal Aid Soc’y of Haw. (LASH) v. Legal Servs. Corp., 961 F. Supp. 1402 (D. Ha. 1997) (enjoining the LSC from enforcing regulatory restrictions on non-LSC funds used for various purposes prohibited under the statute); Legal Aid Soc’y of Haw. (LASH) v. Legal Servs. Corp., 980 F. Supp 1141 (D. Ha. 1997) (requesting further briefing in light of modification of regulatory restrictions); Legal Aid Soc’y of Haw. (LASH) v. Legal Servs. Corp., 145 F.3d 1017 (9th Cir 1998) (unsuccessful constitutional challenge to modified restrictions on LSC organization’s activities); Legal Aid Servs. of Ore. v. Legal Servs. Corp., 608 F.3d 1084 (9th Cir. 2010) (holding restrictions on LSC organization’s activities and program integrity rules did not violate the Constitution). The modified LSC regulations allow LSC organizations to set up affiliate organizations to pursue prohibited activities with non-LSC funds, provided those affiliate organizations meet certain restrictions designed to prohibit resource and staff sharing between the LSC and non-LSC organizations (45 C.F.R. § 1610.8). Because affiliate organizations properly constituted are free from restrictions, courts have held that the current restrictions are constitutional, despite the substantial financial and administrative burden of establishing these parallel organizations.
47. 531 U.S. 533 (2001).
49. Id. at 548.
there is no other viable alternative for securing representation,\textsuperscript{50} so that claims excluded from the LSC docket are unlikely to see the light of day. Our respondents report that similar restrictions, particularly on class actions, are finding their way into IOLTA programs as well. In this way, state and federal funding sources, which are by far the most substantial sources of support for PILOs, have become a means of cabining social change litigation and access to representation for the poor.

The IOLTA challenges, LSC defunding battles, and legislative and regulatory restrictions on organizations that receive government funding raise significant concerns about the increasing dependence of progressive public interest organizations on governmental funds, particularly compared to conservative organizations that rely more on private contributions and less on government support. First, organizations that rely on government funding are vulnerable to political shifts and changes in administration, and governmental actors retain significant control over the scope and nature of the enforcement efforts of these organizations. Second, Velazquez points out, as did \textit{NAACP v. Button}\textsuperscript{51} before it, that public interest representation involves not only providing representation, but also the exercise of free expression, which, the Court reasons, gives voice to otherwise underrepresented interests. Our data suggest that the different funding models of conservative and progressive organizations give the government much greater control over progressive social change efforts than over conservative efforts along the same lines.

Because control over activities comes in many forms, we asked our respondents whether their funding came with restrictions, whether those restrictions affected their activities, and if so, how those restrictions affected their activities. We also sought to determine whether conservative organizations in fact had fewer restrictions on their activities than other organizations. Most organizations (72 percent) received funding with some restrictions. Among those organizations that received funding with restrictions, the most common restrictions were prohibitions on lobbying (50 percent), and requirements that funds be used for a particular target client base (66 percent). In addition, 27 percent of organizations were prohibited from bringing class actions, 29 percent were prohibited from receiving attorney’s fee awards, 37 percent could represent only indigent clients, and 36 percent reported additional other restrictions on their activities.

Conservative organizations were not statistically different from other organizations with regard to restrictions on lobbying and using funds for a particular target client base. Conservative organizations were significantly less likely than other organizations, however, to report funding-related restrictions that prevented them from engaging in class actions,\textsuperscript{52} receiving attorney’s fees awards,\textsuperscript{53} or representing

\begin{itemize}
  \item \textsuperscript{50} Id. at 546.
  \item \textsuperscript{51} 371 U.S. 415 (1963).
  \item \textsuperscript{52} Conservative organizations ($M = .10, SD = .31$) were less likely than other organizations ($M = .29, SD = .46$) to be prohibited from bringing class action claims, $t(29) = -2.50, p < .05$. Levene’s test indicated unequal variances ($F = 25.59, p < .001$), so degrees of freedom were adjusted from 196 to 29.
  \item \textsuperscript{53} Conservative organizations ($M = .05, SD = .22$) were less likely than other organizations ($M = .31, SD = .46$) to be prohibited from receiving awards of attorney’s fees, $t(41) = -4.32, p < .001$. Levene’s test indicated unequal variances ($F = 64.54, p < .001$), so degrees of freedom were adjusted from 197 to 41.
\end{itemize}
nonindigent clients (Figure 5). Excluding the LSC-funded organizations (about 25 percent of the overall sample) from the analysis did not change this result for limits on fee awards or representing nonindigent clients, although the result for class action limits were no longer significant.

At the suggestion of an anonymous reviewer, we also ran the analysis excluding not only LSC organizations but also all other general poverty practice organizations, which amounts to about 44 percent of the overall sample. In that analysis, conservative organizations were significantly less likely than other organizations to be prohibited from engaging in class actions, receiving attorney’s fees, or engaging in lobbying. Conservative organizations were also significantly less likely to have other limits on their activities. Thus, even when only organizations other than poverty-focused organizations are considered, conservative organizations were less likely than others to rely on funding that comes with restrictions. Nevertheless, among organizations that did not do poverty work, conservative organizations did not differ from other organizations in requirements to use funds for specific clients or to impose income limits on their clients. The lack of variation on these two dimensions is not surprising, given that the poverty-oriented organizations excluded from this analysis would be the ones most likely to be subject to these restrictions.

54. Conservative organizations ($M = .10, SD = .31$) were less likely than other organizations ($M = .41, SD = .49$) to be required to impose income limits on their clients, $t(31) = -3.94, p < .001$. Levene’s test indicated unequal variances ($F = 124.13, p < .001$), so degrees of freedom were adjusted from 197 to 31.

55. Analysis not shown.
We divided the data in a slightly different way to examine differences among cause-oriented groups across ideology. We limited the analysis to organizations that reported that more than half their efforts went to impact litigation or that their efforts focused on an appellate intervention model based on amicus briefs. This analysis excludes organizations primarily engaged in direct services, but includes organizations, including some impact-litigation oriented poverty organizations, that engage primarily in social change litigation. Conservative organizations made up about 11 percent of these activist organizations, which is roughly the same proportion that conservative organizations occupy in the full sample. Among these litigation-oriented PILOS, conservative organizations were significantly less likely than all others to be subject to any of the restrictions we measured. They were less likely to be prohibited from engaging in class actions, engaging in lobbying, or receiving attorney’s fees, and they were less likely than others to receive funds limited to specific clients, to be required to screen clients by income limits, or to have other limits on their activities.

Why would this group of activist organizations still show variation in funding restrictions across political orientation, even after we eliminated direct services organizations from the analysis? Not all governmental funding comes from the LSC, and cause-oriented organizations may rely on IOLTA funds or other sources of government funds that also place limits on recipient organizations’ activities. It may also be that funding from the organized bar, an important source of support for progressive organizations, comes with limitations intended to protect private lawyers’ clients. Conservative PILOS may largely escape these restrictions because they rely more on foundation funding and private donations than do other organizations.

We note that there are important qualitative differences among these restrictions. Targeting funds toward a particular client base does not restrict how a public interest attorney goes about representing his or her clients. Limits on lobbying do restrict the attorney’s activities, but still leave open all the activities encompassed in the practice of law. In contrast, limits on class action claims or recovery of fee awards prevent public interest attorneys from making use of litigation tools designed to encourage enforcement actions, deter wrongdoing, and efficiently resolve clients’ claims. These limitations take away tools normally encompassed in the practice of law.

To gain a sense of the qualitative effects of funding restrictions such as these, we asked respondents how these restrictions affected their practice. By far the most common concern was how attorney’s fees restrictions and class actions restrictions affected the organization’s ability to represent its clients effectively. For example, respondents said that the inability to request attorney’s fees changed the dynamic in

56. Analysis not shown.
57. About 21 percent of organizations (N = 37) report that more than 50 percent of their efforts are directed at impact litigation. Conservative organizations constitute a larger proportion of this group of organizations (27 percent) relative to their proportion in the overall sample (10 percent), although they remain a minority. A chi-square test of independence was performed to examine the relation between ideology and impact litigation. The relation between these variables was significant, \( \chi^2 (1, N = 175) = 20.39, p < .001 \). Conservative organizations are more likely than other organizations to report that more than 50 percent of their efforts were directed at impact litigation. This group of impact litigation organizations was too small to provide meaningful statistical analysis on our measures of funding restrictions, however.
litigation and subtly undermined their ability to advocate for their clients. Numbers in brackets after the quotations identify each unique respondent.

We can’t follow through with all, like you say you do a consumer case and you can’t ask for attorney’s fees, which is like your number one . . . deterrent to companies. Because it doesn’t really lose them much if you can’t ask for attorney’s fees. [2030]

Not being able to ask for attorney’s fees decreases the value of your cases, which makes settlement, I mean it just, it affects everything. If we can’t ask for attorney’s fees, then the opposing, you know, our opponents are less likely to settle. And it just makes your case weaker. Same with class action lawsuits. It decreases the value and the, the potential effect of your case. It really ties our hands. [2033]

[The prohibition against fees has affected us] in two ways. In the past we probably received close to a half million dollars a year in funding from attorney fee awards. So it affects us financially. Secondly, when you practice law representing poor people, one of the biggest tools that you had . . . was, once you filed a lawsuit, you could negotiate around things like attorney fees. And lawyers in the real world understood that. Now . . . if you file a lawsuit seeking some sort of injunctive relief, they don’t particularly care to settle. Because they know that if they try the case, they’re not going to have to pay any attorney’s fees anyway. So if they were going to settle it, they’d settle it later not sooner. And it, uh, I think it adversely affects clients. . . . They don’t have the full range of rights that they previously did because of that. . . . They enter the process merely as a secondary class of citizens. They don’t have the full rights that everybody else does. They don’t have the right to collect attorney fees. And because of that, opposing lawyers take a different strategy. . . . Because they can’t collect attorney fees, I believe it limits their rights. [2099]

Underrepresented clients could perhaps still obtain counsel in class actions and fee-shifting cases if PILOs could refer these cases to private counsel. As we have reported elsewhere, however, recent Supreme Court decisions limiting recovery of attorney’s fees have made private counsel less willing to take on these cases, and our sample organizations have had problems finding private counsel willing to represent clients they need to refer (Albiston and Nielsen 2007).

Several organizations also indicated that their inability to bring a class action prevented effective and efficient advocacy for their clients.

Occasionally, we’ll be presented with an issue that would benefit our client population if we could do it in a class action . . . to effect more broad change for our community base and we can’t do that. So probably class action is a big one. [2034]

[These restrictions] have denied us tools that we need. Class action is a tool. I mean, that’s like saying you can’t file motions to dismiss. We are not, we’re not

58. Numbers in brackets at the end of quotations are the organizational ID number from our survey database.
allowed to use a tool in representing poor people. It’s an important legal tool that we are denied the right to use on behalf of poor people. [2179]

At the time the class action restriction went into effect, in ’95, we were involved in some class actions. We had to withdraw from those class actions. That was an immediate effect. It also changes the way that we can litigate certain cases and get some issues addressed the court so that we have to change the way we handle certain cases. [2181]

The fact we can’t do class actions has limited our ability to take on cases where a large number of people are harmed, [and] . . . it’s too expensive to take on [all the] individual cases [that constitute a larger] class. A lot of government agencies know that. [2091]

I would say probably the most difficult issue has been class action. There are a lot of systemic problems that affect the Native American population that are better addressed in a class action than individual litigation. [2251]

Well, they’ve limited our ability to get attorney’s fees and they’ve prevented us from, in some situations, pursuing the broader remedy of a class action when it would have been appropriate and efficient. So they’ve made us less efficient and they’ve cost us money. [2276]

Limitations on class actions curtail a particularly cost-effective and efficient way of providing representation to low-income clients whose individual damages may not be large enough to attract contingency fee representation. Repetitive, similar claims involving lost wages for low-wage workers or consumer losses of small value are paradigmatic examples. As one court recently noted:

The class action device and the concept of the private attorney general are powerful instruments of social and economic policy. Despite inherent tensions, they have proven efficacious in resolving mass claims when courts have insisted on structural, procedural, and substantive fairness. Among the goals are redress of injuries, procedural due process, efficiency, horizontal equity among injured claimants, and finality. Arguably, a legal system that permits robust litigation of mass claims should also provide ways to fairly and effectively resolve those claims.59

Class actions also spare courts from hearing repetitive, similar claims. Yet these kinds of claims have become the target of restrictions that accompany major sources of funding for PILOs.

Respondents also explained how the subject matter restrictions have prevented them from representing particularly vulnerable client groups or from responding to requests from the community.

[The restrictions have] prevented us from engaging in important legal work that we’ve been asked to do by our clients and community organizations. [2060]

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Portions of the low-income community who do not have documented immigration status are more subject to exploitation. Because they don’t have recourse to services, legal services. [2206]

We cannot represent certain highly vulnerable populations: inmates, immigrants primarily. [2269]

In addition, a few organizations reported that complying with regulations that imposed restrictions on funding produced a general chilling effect on their choice of clients and strategies.

I think that it also makes us more cautious, so we may not do things we are allowed to do, but we’re so concerned about violating the regulations that we may become too cautious. [2279]

In short, these responses suggest that funding regulations (particularly those imposed on LSC organizations) have much broader effects than simply limiting the subject areas in which these organizations practice. Prohibiting fee recovery has subtle and far-reaching effects on how cases are litigated and settled, and on the general deterrent value of consumer and civil rights protections. Not allowing organizations to engage in class action litigation makes their efforts less efficient and, to the extent that the issues they deal with raise systemic concerns, less effective. Finally, the funding regulations may also produce a general chilling effect on the efforts of an organization such that it shies away from engaging in some activities that are permitted by the law. To the extent that conservative organizations are not hobbled by these restrictions, they are likely to be more efficient and effective advocates for their causes.

FUNDING MODELS: A COMPARATIVE INSTITUTIONAL PERSPECTIVE

Although we have discussed many nuances about the variation in funding structures among public interest organizations, we believe three central findings stand out. First, funding structures are remarkably similar across practice areas, much more so than we expected, given the diversity of causes public interest organizations serve. Although our data do not allow us to analyze the institutionalization process over time, the uniformity is consistent with the interpretation that PILOs have become institutionalized as a form of law practice. Second, funding patterns for these organizations seem to have shifted over time from private, foundation support toward federal and state funding. Our data suggest that along with this pattern comes vulnerability to political attack and governmental control over the activities of these organizations. Finally, our data indicate that conservative organizations have bucked this trend; they rely less on government support and more on private sources of funding, which gives them more freedom to advocate for their causes. In future work, we hope to explore the link between funding models and the specific activities of public interest organizations, such as media advocacy, community organizing, impact litigation, and the like.
Our data raise important comparative institutional questions about which funding models PILOs should adopt, and which funding models policy makers should consider for the future. Different funding models provide different opportunities and constraints on public interest organizations. Scholars increasingly recognize that choices among market, governmental, or nonprofit approaches to providing legal representation force difficult tradeoffs among political vulnerability, independence, sustainability, and strategic resources available to organizations (Luban 2003; Rhode 2008; Abel 2009; Cummings 2012). These difficult choices should not surprise us. Organizational theory teaches that nonprofits operate in particularly challenging environments, often serving many constituencies and subject to vague and conflicting standards for success (Alexander 1998). In the nonprofit organizational field, the funding environment has the potential to pull public interest organizations and social movements away from their mission, particularly where nonprofits’ external funding sources are distinct from their client base (Alexander 1998).

By providing data from the only available recent and representative sample of PILOs, our study sheds light on the distribution of funding strategies in the modern public interest law field. These representative data help evaluate the implications of PILO funding models for organizational strategies and independence. Of course, one might imagine a range of funding strategies for public interest representation that include and extend beyond the nongovernmental PILOs in our survey. Such strategies might include relying on private pro bono efforts, increasing foundation and private support for public interest organizations, moving to a civil Gideon-like model that provides government support for individual representation, expanding fee-shifting statutes in certain circumstances, or lifting restrictions on federal and state funds for public interest organizations (see Abel 2009; Cummings 2012). Each of these options has strengths and weaknesses. We discuss some of those concerns here, but reserve for another day the attempt to resolve which institutional arrangement might be best.

Campaigns to expand private pro bono efforts continue, including a recent push by the ABA to step up pro bono commitments after Congress enacted the LSC funding restrictions (Cummings 2004). Pro bono time contributed by lawyers working in the for-profit sector provide, in hours, the equivalent of several thousand full-time legal aid lawyers (Cummings 2012), but hours of service are an inexact measure of representation, one that does not account for expertise, experience, or commitment to client constituencies. The primary objections to pro bono representation, at least as a replacement for public interest organizations, are that private lawyers lack poverty experience, private lawyers may refuse to take certain cases due to (perceived) positional conflicts with their paying clients, and that diffuse private representation undermines the ability to seek systemic reform (Spaulding 1998; Johnson 1999; Cummings 2004). Of course, pro bono representation avoids the restrictions on advocacy and political vulnerability that go along with government funding. Nevertheless, pro bono representation may trade political constraints for economic constraints: firm commitments to pro bono representation may waiver when the demand from paying clients for their lawyers’ services is strong enough to absorb their lawyers’ available time. In addition, empirical evidence suggests pro bono efforts respond to market forces in more subtle ways, expanding when the profession perceives that its jurisdictional control over legal services is under siege, and contracting when control over the
provision of legal services seems secure (Sandefur 2007). These dynamics do not necessarily track fluctuations in the need for pro bono representation.

Another alternative would be to increase foundation and private support for public interest organizations, which again would avoid the restrictions and political vulnerability that come with government funding. Not all causes are easy to sell to the foundation or private giving market, however. As the historical vilification of welfare recipients and immigrants shows, unpopular causes or clients are likely to suffer under this strategy. In addition, foundation support brings a subtle coercion of its own: to the extent that foundations develop their own funding priorities, then seek worthy programs to fund, public interest organizations may find themselves adjusting their agendas to chase resources, giving up their autonomy over defining their priorities (Alexander 1998; Jenkins 1998). To alleviate this concern, progressive foundations might take a page from the conservative foundation playbook and devote more resources to general operating support, rather than start-up funds for individual, targeted programs (Covington 1997; Teles 2008). To be sure, not every organization that relies on foundation or private support will be coopted by the interests of its benefactors. When organizations have diverse sources of support, and missions that closely track those of their foundation supporters, they will be less likely to be drawn away from their initial goals (Alexander 1998). Nonetheless, in many public interest contexts, deep social divides separate the clients of PILOs from the patrons that support PILO activities (see Jenkins 1998), and some scholars argue that social movement organizations that accept foundation support risk deradicalization and cooptation (Staggenborg 1988; Roelofs 2003). This structural feature of the foundation-funding model presents a difficult environment for PILOs to navigate successfully.

A civil Gideon approach, although promising, raises its own concerns, not the least of which was the Supreme Court’s recent refusal to recognize a right to civil council in *Turner v. Rogers*. Even assuming no activity restrictions would attach to a state-funded civil representation program, state funding still leaves such a program subject to budget variability as political administrations change. Moreover, as the criminal representation system has taught us, low levels of funding, overwhelming case loads, and lack of institutionalized offices may lead to poor-quality representation for those that rely on such a program. A Medicaid, fee-for-service type program might be possible, but would likely bring bureaucratic burdens, funding limitations, and restrictions of its own. Such a program, if sufficiently diffuse, might also limit opportunities for systemic reform, although perhaps it would provide enough funding to staff a legal services oriented “low bono” law office. Law offices such as these could remain going concerns through sliding-scale representation of low-income clients and with subsidized reimbursement through a fee-for-service model. Arguably, this approach would allow lawyers to focus more on client representation and less on fundraising, and would also help expand services to those who cannot meet poverty income restrictions but still cannot afford legal assistance on their own. Such a program would likely have broad support from the private bar, as it expands the market for legal services, and perhaps would give attorneys more autonomy in their work.

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*60. 131 S. Ct. 2507 (2011) (refusing to require court-appointed counsel for a low-income father facing jail time in a civil contempt proceeding for failure to pay child support).*
Fee-shifting statutes offer another funding model in which PILOs obtain support through successful litigation and are paid by defendants who lose. Some argue that this strategy democratizes and decentralizes enforcement by allowing private parties to decide whether to take action (Albiston and Nielsen 2007). Fee shifting also avoids the need for large bureaucratic agencies and promotes more efficient detection of violations through an army of private attorneys general (Burke 2002; Albiston and Nielsen 2007). Such an approach would require legislative revisions after recent Supreme Court decisions curtailing the availability of fees in many cases, however (Albiston and Nielsen 2007). And not all public interest clients are plaintiffs; fee-shifting statutes will do little for defendants in unlawful detainer actions, or for welfare recipients defending against charges of fraud or overpayment. Reliance on fee shifting to fund public interest activities may have more subtle effects as well, by driving organizational efforts toward litigation and away from non-fee-generating activities that nevertheless have a big impact, such as education, outreach, media campaigns, or community organizing. Expanding fee-shifting opportunities would, however, provide a source of support relatively insulated from governmental control.

One might also lift restrictions on LSC funds to support poverty advocacy more broadly, and to permit attempts at systemic change. Such a strategy might very well improve the delivery of legal services, although, again, government funding remains subject to cutbacks as administrations change. Government funding also creates a state actor vulnerable to constitutional legal challenges such as the IOLTA litigation that we discussed above. And the legal services organization is just one of several models of public interest lawyering; other models place more emphasis on social change litigation and less on direct services. There may be legal services models other than the LSC approach that have desirable characteristics worth supporting. Government might also step up its own enforcement, by not only litigating but also enforcing requirements for federal contractors, and establishing best practices for the industry as a whole. Indeed, some commentators argue that by drawing on these nonlitigation strategies, government enforcement would be better able to change systemic and structural barriers to reaching equity goals (Johnson 2012). Whatever its form, however, government enforcement risks political variability and underfunding, particularly for representation of politically unpopular clients.

These funding questions are not merely theoretical concerns. In the past five years, there has been renewed academic and policy interest in public interest law and access to justice. In March 2010, the US Department of Justice launched the Access to Justice Initiative to improve the availability, quality, and effectiveness of representation for those who cannot afford lawyers. The National Science Foundation, the American Bar Foundation, and the Stanford Center on the Legal Profession all recently held research summits to discuss unanswered questions in the literature on access to justice. A theme that emerged from these meetings was the lack of empirical work on supply-side questions related to provision of legal services, including the funding available to these organizations, the areas in which these organizations practice, and stratification in the provision of services by geography or population served (Rhode 2011; Sandefur and Smyth 2011). We need to understand not only which funding models PILOs currently use, but also what comparative institutional consequences flow from funding choices that may be made in future policies.
We raise these questions about funding models to expand the debate using our findings, not to attempt an exhaustive comparative institutional analysis of all possible and available funding models. The most effective, or desirable, model would likely be a hybrid of some of the options outlined above, with some sources of support for broad-based activities such as education and outreach, community organization, and systemic reform. The important questions concern the conditions under which, and the client populations for which, various funding approaches would be most useful. We do want to point out, however, that, with possible exceptions of increased foundation/private support or less restricted LSC funding, most of the options discussed in this section would likely drive public interest practice closer to the private practice model of individual client representation in adjudicatory forums, and away from other legal strategies directed at social change, including nonlitigation strategies such as client education and outreach or community economic development. To us, this suggests that one must first answer the larger questions of what public interest lawyering is meant to be, what are the goals it is intended to address, and what mission public interest lawyers are meant to serve (Hilbink 2004). The answers to these policy questions about what public interest law should be can then inform us how to go about funding the cause.

REFERENCES


**CASES CITED**


Legal Aid Servs. of Ore. v. Legal Servs. Corp., 608 F.3d 1084 (9th Cir. 2010).
Sullivan v. DB Inv., Inc., 667 F.3d 273 (3d Cir. 2011).

STATUTES CITED

45 C.F.R. § 1610.8.